Supreme Court, U.S.
FILED
JUL 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1765

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

Bankers Life and Casualty Company,
Appellant,

V.

Lloyd M. Crenshaw,
Appellee.

On Appeal from The Supreme Court of Mississippi

BRIEF OF AMICUS CURIAE NATIONAL INSURANCE CONSUMER ORGANIZATION IN SUPPORT OF APPELLEE

Jay Angoff
National Insurance
Consumer Organization
121 N. Payne Street
Alexandria, VA 22314

Counsel for Amicus Curiae

July 13, 1987

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. PUBLIC POLICY DEMANDS THAT COURTS AND JURIES NOT BE STRIPPED OF THEIR AUTHORITY TO AWARD PUNITIVE DAMAGES WHEN INSURANCE COMPANIES ENGAGE IN OUTRAGEOUS MISCONDUCT	5
II. THE EIGHTH AMENDMENT DOES NOT APPLY TO PUNITIVE DAMAGES IN CIVIL CASES	24
III. THE EIGHTH AMENDMENT DOES NOT APPLY TO CORPORATIONS	29

PAGE

IV. EVEN IF THE EIGHTH AMENDMENT APPLIED TO PUNITIVE DAMAGE JUDGMENTS AGAINST CORPORATIONS, THE JUDGMENT IN THIS CASE WOULD NOT VIOLATE THE EIGHTH AMENDMENT 35

CONCLUSION 43

TABLE OF AUTHORITIES

CASES:	PAGE
Bankers life and Casualty Co. v. Crenshaw, 483 So.2d 254 (Miss. 1985)	passim
California Bankers Assn. v. Shultz, 416 U.S.21 (1974) ..	32
Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1974)	17
Coker v. Georgia, 433 U.S. 584 (1977)	35
Earl of Devon's Case, 11 State Tr. 1354 (1689)	34
Enmund v. Florida, 458 U.S. 782 (1982)	35
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977)	passim
Fletcher v. Western National Insurance Co., 10 Cal. App.3d 376, 89 Cal. Rptr. 78 (1970)	11, 12
Fong Yue Ting v. United States, 149 U.S. 698 (1893)	28

PAGE

Grey v. Grant, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764) 17

Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1794) 27, 34

Hutto v. Davis, 454 U.S. 370 (1982) 36

In re Gault, 387 U.S. 1 (1967) 29

Ingraham v. Wright, 430 U.S. 651 (1977) ..... passim

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 34

Lincoln American Insurance Co. v. Ruscoe, 210 So.2d 769 (Miss. 1968) 14

Merest v. Harvey, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814) 17

Peerless Insurance Co. v. Myers, 192 So.2d 437 (Miss. 1966) 14

Robinson v. California, 370 U.S. 660 (1962) 27, 36

Rummel v. Estelle, 445 U.S. 263 (1980) 37

PAGE

Solem v. Helm, 463 U.S. 277 (1982) ..... passim

Smith v. Wade, 461 U.S. 30 (1982) ..... passim

Standard Life Insurance Co. v. Veal, 354 So.2d 239 (Miss. 1978) 9

Uphaus v. Wyman, 360 U.S. 72 (1959) 28

United States v. White, 332 U.S. 694 (1944) 29, 34

Walker v. Sheldon, 10 N.Y. 2d 401, 223 N.Y.S. 488, 179 N.E. 2d 497, 499 (N.Y. 1961) 9

Weems v. United States, 217 U.S. 349 (1910) ..... passim

Wilson v. United States, 221 U.S. 361 (1911) 31, 32

Zurich Insurance Co. v. Ruscoe, 203 So.2d 305 (Miss. 1967) 14

CONSTITUTIONAL AND STATUTORY PROVISIONS:

English Bill of Rights of 1689 .. 25, 32

	PAGE
Magna Carta, Chapters 20-22	32
Mississippi Code Ann. Sec. 83-5-33 (1972)	6
Mississippi Code Ann. Sec. 97-17-41 (1972)	41
Pennsylvania Frame of Government of 1682	33
U. S. Constitution, Eighth Amendment	passim
U. S. Constitution, Fourteenth Amendment	29
15 U.S.C. Sec. 1011 et. seq.	7, 8
42 U.S.C. Sec. 1983	passim

OTHER AUTHORITIES:

Aetna Casualty & Surety Co., "Bodily Injury Claim Cost Impact of Florida Tort Law Change" (1986)	21
American Bar Foundation, Preliminary Report of the Punitive Damages Project (1986)	22
D. Dobbs, Law of Remedies (1973) ..	15

PAGE

Ghiardi and Kircher, Punitive Damages (Supp. 1986) 41

Insurance Services Office, Inc., Claim Evaluation Project (1987).. 25

K. Redden, Punitive Damages (1980) .. 15

Keenan and Gillespie, The Insurer and the Tort of Intentional Infliction of Mental Distress, 39 Ins. Couns. J. 335 (1972) 12

Kornblum and Thornton, The Seismic Impact of Punitive Damages in Actions Against Insurers, 77 Best's Rev. 36 (1976) 12

Levine, Demonstrating and Preserving the Deterrent Effect Of Punitive Damages in Insurance Bad Faith Actions, 13 U.S.F.L. Rev. 613 (1979) 13

Morris, Punitive Damages in Tort Cases, 44 Harv.L. Rev. 1173 (1931) 10

Rand Institute for Civil Justice, Contributions History, Sept. 7, 1984 22

PAGE

Rand Institute for Civil Justice, Punitive Damages: Empirical Findings (1987) 23

Texas State Board of Insurance, Texas Liability Insurance Closed Claim Study (1987) 20

United States Department of Commerce, Bureau of the Census, Household Wealth and Asset Ownership: 1984 41

United States General Accounting Office, Issues and Needed Improvements in State Regulation of the Insurance Business (1979) . 7

No. 85-1765

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

Bankers Life and Casualty Company,
Appellant,

V.

Lloyd M. Crenshaw,
Appellee.

On Appeal from The Supreme Court of Mississippi

BRIEF OF AMICUS CURIAE NATIONAL INSURANCE CONSUMER ORGANIZATION* IN SUPPORT OF APPELLEE

---

* This brief is filed with the written consent of the parties, copies of which are on file with the Court.

INTEREST OF AMICUS CURIAE

The National Insurance Consumer Organization (NICO) is a non-profit, non-partisan consumer organization with approximately 2,000 individual members. It is the only national consumer organization which devotes its full time to insurance matters. It was founded in 1980 by J. Robert Hunter, Federal Insurance Administrator under Presidents Ford and Carter, who is NICO's president and a member of its Board of Directors. NICO's other Directors are Howard Clark, a former South Carolina Insurance Commissioner, and James Hunt, a former Vermont Insurance Commissioner.

NICO receives frequent complaints from its members and other insurance policyholders about alleged misconduct by insurance companies, and suggests various

remedies that such policyholders may have. Because Bankers Life is asking this Court to emasculate the most effective remedy policyholders have -- the insurance bad-faith action -- NICO and those it represents have a direct and substantial interest in this case.

In addition, during the last two years the insurance industry has conducted a massive and misleading public relations campaign designed to pursuade legislators to limit the ability of injured individuals to recover damages, including punitive damages, in court. That campaign rests on the false premise that the costs of punitive damages outweigh their benefits. Because Bankers Life now carries that campaign and that false premise into this Court, NICO has an interest in responding in this Court.

STATEMENT OF THE CASE

Amicus NICO adopts appellee Crenshaw's statement of the case.

SUMMARY OF ARGUMENT

Public policy demands that courts and juries not be stripped of their authority to award punitive damages against insurance companies found to have engaged in outrageous misconduct. Punitive damages are the only effective punishment for and deterrent to such misconduct; they are a well-deserved reward for a plaintiff who has brought a wrongdoer to justice; they compensate the plaintiff for otherwise uncompensable expenses of litigation; and they provide a sense of satisfaction to the wronged individual that violent action against the wrongdoer provides in societies less civilized than ours.

While the benefits of punitive damages are thus direct and substantial, their costs are minimal. The insurance industry has sought to persuade the public, and now this Court, that punitive damage payments are out of control; the empirical evidence demonstrates, however, that this claim is false.

The Eighth Amendment was intended and has always been interpreted to apply to criminal cases, not civil cases, and to protect individual rights, not corporate rights. Yet even if the Eighth Amendment did apply to punitive damage judgments against corporations, thus invoking proportionality analysis, the punitive damage judgment against Bankers Life in this case would not violate the Eighth Amendment. The Court has held that the deprivation of a lifetime of liberty for dishonestly obtaining $230 is not

disproportionate; therefore, a fortiori, deprivation of no liberty for in effect dishonestly obtaining $20,000, as Bankers Life has done, is not disproportionate.

ARGUMENT

I. PUBLIC POLICY DEMANDS THAT COURTS AND JURIES NOT BE STRIPPED OF THEIR AUTHORIT TO AWARD PUNITIVE DAMAGES WHEN INSURANCE COMPANIES ENGAGE IN OUTRAGEOUS MISCONDUC

The doctrine of punitive damages is "accepted as settled law by nearly all state and federal courts, including this Court." Smith v. Wade, 461 U.S. 30, 35 (1982). The doctrine serves several beneficial purposes, all of which are all well-served by punitive damage judgments in insurance bad faith cases, and are particularly well-served by the punitive damage judgment in the instant case.

Most obviously, punitive damages punish the defendant. Smith, 461 U.S. at 54; Bankers Life and Casualty Co. v. Crenshaw, 483 So.2d 254, 268-69 (Miss. 1985). The punitive function of punitive damage judgments against insurance companies is particularly important because insurers are as a practical matter exempt from other methods of punishment. First, because they are artificial rather than natural persons, they can be subjected to neither the death penalty nor incarceration. Second, as appellant makes clear, the statutory penalty for outrageous misconduct by insurance companies in most states is a token one. Bankers Life Br. at 14, 34, 35. In Mississippi, for example, it is $1,000, or about 3/10,000 of 1% of appellant's net worth. Miss. Code Ann. Sec. 83-5-33 (1972). Third, state insurance departments frequently have neither the

willingness nor the ability to meaningfully regulate insurer conduct. When insurance companies engage in misconduct, according to a study of state insurance regulation by the United States General Accounting Office (GAO) in 1979, "the authority of departments to order corrective action is very limited." United States General Accounting Office, Issues and Needed Improvements in State Regulation of the Insurance Business, at ii. (1979). In addition, as the GAO rather delicately put it, "insurance regulation is not characterized by an arms-length relationship between the regulators and the regulated," with insurance commissioners typically coming from and returning to the industry. Id. at vii. Finally, insurance companies are exempt from federal regulation under the McCarran-Ferguson Act.

1/ Even companies that engage in the most reprehensible, bad-faith dealings with their policyholders, therefore, know that the federal government can not punish them. In short, the only punishment that can be "felt" by an insurance company is a punitive damage judgment.

The second purpose of punitive damages is deterrence, of both the defendant and others. Smith, 461 U.S. at 54; Bankers Life, 483 So.2d at 268-69. Because of the lack of effective oversight of insurance by government, punitive damages are the only real deterrent to bad-faith conduct by insurance companies, just as they are the only meaningful punishment for such conduct. Compensatory damages, since they

---

1/ 15 U.S.C. Sec. 1011 et seq. The McCarran Act also substantially exempts the business of insurance from the antitrust laws.

are limited to the amount of the plaintiff's claim, offer no deterrent. To hold an insurer found to have refused in bad faith to pay a valid claim liable only for the amount of that claim is tantamount to requiring a convicted armed robber only to make restitution of the money he stole. No one would argue that restitution by armed robbers is a meaningful deterrent to armed robbery; neither can one reasonably argue that compensatory damages are a meaningful deterrent to insurance company bad faith. See Bankers Life, 483 So.2d at 269, quoting Standard Life Ins. Co. v. Veal, 354 So.2d 239 (Miss. 1978) ("If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity.") See also Walker v. Sheldon, 179 N.E.2d 497, 499 (N.Y. 1961) ("In the calculation of his

expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business."); Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1185-88 (1931) (recommending punitive damages "where the risk of having to pay compensation probably would not discourage the commission of wrongs.").

Third, punitive damages reward the plaintiff for performing the public service of bringing a wrongdoer to justice. Bankers Life, 483 So.2d at 269 (citation omitted). This "reward" function is particularily important where, as here, compensatory damages alone are not of

sufficient magnitude to make it economically feasible for a lawyer to pursue the case, or for a plaintiff of modest means to pay expenses in connection with the case -- particularly in view of the ability of insurers, with resources thousands of times greater than the plaintiff's, to simply wear him down during the course of litigation.

The public service performed by plaintiffs who bring insurance bad faith cases is enormous: they encourage insurance companies to deal more fairly with their policyholders. For example, in 1970 the California Court of Appeal upheld a punitive damage judgment against an insurer which had sought to induce a disabled policyholder into surrendering his policy by writing him false and threatening letters. Fletcher v. Western National Insurance Co., 10 Cal. App.3d 376, 89 Cal.

Rptr. 78 (1970). Soon thereafter, two insurance company lawyers wrote an article advising insurers that Fletcher made it imperative for them to be cautious and fair in handling claims, since "any deviations from ethical business practices will subject them to harsh retromands." 2/ Similarly, a 1976 article in an insurance journal suggested nine steps, including making full disclosure to the insured and paying claims promptly, that insurers should take to avoid punitive damage verdicts. 3/ Dozens of other articles

---

2/ Keenan and Gillespie, The Insurer and the Tort of Intentional Infliction of Mental Distress, 39 Ins. Couns. J. 335 (1972).

3/ Kornblum and Thornton, The Seismic Impact of Punitive Damages in Actions Against Insurers, 77 Best's Rev. 36 (1976)

urging insurance companies to reform their claims practices have been written. They do not urge insurers to avoid dealing in bad-faith because it is immoral, but only because it subjects them to the possibility of large punitive damage judgments. 4/

The instant case, if affirmed by this Court, will strongly encourage insurers to deal more fairly with their policyholders. Here, the policy provision under which Bankers Life told Crenshaw his claim was denied required that a loss be caused solely by accidental bodily injury to be compensable. Bankers Life, 483 So. 2d at 270. The Mississippi Supreme Court had

---

4/ See generally Levine, Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions, 13 U.S.F.L. Rev. 613 (1979)

since 1966 held that provision invalid, 5/ but Crenshaw had no reason to know it was invalid. Bankers Life therefore, as the court below found, "took the consistent and deliberate choice to deny coverage for an invalid reason." Id. As the court below also observed, other innocent, unknowing policyholders with valid claims may also have had their claims denied for that invalid reason. Id. The judgment in the instant case is likely to have the public benefit of reducing the number of valid claims that insurance companies deny, since presumably Bankers Life will delete the invalid provision from its future policies, as will any other insurance companies which

---

5/ Peerless Insurance Co. v. Myers, 192 So.2d 437 (Miss. 1966); Zurich Insurance Co. v. Ruscoe, 203 So.2d 305 (Miss. 1967); Lincoln American Insurance Co. v. Ruscoe, 210 So.2d 769 (Miss. 1968).

currently use the provision. 6/

A fourth purpose of punitive damages is compensation of the plaintiff for expenses he has incurred that are not compensated for by compensatory damages, such as attorney's fees and other litigation expenses. Smith v. Wade, 461 U.S. at 90 (Rehnquist, J., dissenting), 7/ citing D. Dobbs, Law of Remedies 221 (1973); K. Redden, Punitive Damages, Sec.

6/ If insurers do not now delete the invalid provision, of course, they are subject to further punitive damage judgments -- which is both an incentive for Bankers Life and others to delete it, and an argument against limiting punitive damages.

7/ In Smith, in which the Court affirmed a punitive damage judgment against a prison guard found to have inadequately protected an inmate, three justices dissented from the Court's holding that recklessness was a sufficient standard for an award of punitive damages under 42 U.S.C. Sec. 1983. They believed that such an award required

2.4(C) (1980). If Crenshaw receives $20,000 in compensatory damages for Bankers Life's breach of contract, for example, he is not made whole, since he must pay his lawyer and must also pay the expenses of suit. Punitive damages thus provide compensation for such expenses, in addition to serving their other, admittedly more important purposes.

Finally, punitive damages serve the purpose of vengeance. In societies less civilized than ours, individuals harmed by another do not seek to redress their grievances in court but rather seek revenge through violence against the wrongdoer.

"at least some degree of bad faith or improper motive on the part of the defendant." 461 U.S. at 56 (Rehnquist, J., dissenting). Bankers Life's conduct in the instant case clearly meets the standard sought by the Smith dissenters, since Bankers Life "took the consistent and deliberate choice to deny coverage" for a reason it knew was invalid. Bankers Life, 483 So.2d at 270-71. The Smith dissenters

Punitive damages are a socially acceptable surrogate for such vengeance. See Campbell v. Government Employees Insurance Co., 306 So. 2d 525, 531 (Fla. 1974) ("Punitive damages have helped to maintain public tranquility by permitting the wronged plaintiff to take his revenge in the courtroom and not by self-help."); see also Merest v. Harvey, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814) (acknowledging that one purpose of large exemplary punitive damage awards was to prevent dueling); Grey v. Grant, 2 Wils. K.B. 252, 95 Eng. Rep. 796 (C.P. 1764) (same). They are a highly

---

also were somewhat skeptical about whether Congress intended punitive damages to be awarded at all under Sec. 1983, and were concerned that such an award could have three adverse effects. 461 U.S. at 84-92 (Rehnquist, J., dissenting). In the instant case, however, failure to affirm the punitive damage judgment would have those same adverse effects. First, the Smith dissent argued that permitting

civilized way of providing the plaintiff at least some of the satisfaction that more direct action would provide.

Because punitive damages further all the above purposes, their benefit to society is clear and substantial. Thus, even if punitive damages imposed

---

punitive damages under Sec. 1983 would discourage public officials from acting decisively because "when swift action is demanded, their thoughts likely will be on personal financial consequences that may result from their conduct." Id. at 88. In contrast, the threat of punitive damages encourages insurance companies to act when swift action is demanded, because they must think of the financial consequences of not acting. Second, the dissent pointed out the "staggering effect of Sec. 1983 claims upon the workload of the federal courts." Id. at 91. In contrast, insurance bad faith cases have had little effect on that workload. They would have a substantial effect, however, if appellant's challenge to punitive damage judgments in state courts is upheld. Third, the dissent argued that when federal courts enforce

substantial costs on insurers, the benefits of punitive damages would justify those costs. In fact, however, the empirical evidence indicates that the costs of punitive damages to insurers are minimal.

In February 1987, for example, the Texas State Board of Insurance analyzed 3,367 claims that had been closed in Texas

---

punitive damage judgments against local officials they "intrude into sensitive areas of sovereignty of coordinate branches of our nation, thus implicating the most basic values of our system of federalism." Id. at 92. In contrast, upholding the Mississippi Supreme Court's affirmance of the instant punitive damage judgment would futher the basic values of federalism, while overturning it would be unwarranted intrusion into Mississippi's sovereignty.

The dissent also noted that the compensatory function of punitive damages did not come into play in Sec. 1983 cases, because the statute provided for an award of attorney's fees to a prevailing plaintiff. Id. at 90. No such award, of course, is made in insurance bad faith cases.

between November 1983 and December 1986. The total paid out in those cases was $487,703,243; the total paid out in punitive damages was $100,000, or about 1/50 of 1% of the total. Texas State Board of Insurance, Texas Liability Insurance Closed Claim Study 89 (1987). Punitive damages were assessed in 6/10 of 1% of general liability claims, and 2/10 of 1% of medical malpractice claims. Id. at 32.

Amicus Aetna also conducted a study which concluded that the cost of punitive damages was minimal. To determine the effect on its claim costs of Florida's new "tort reform" law, which included limitations on punitive damages, Aetna analyzed 105 claims it had recently closed. In submitting the analysis, which demonstrated that the new law would have no effect, to the Florida Insurance

Commissioner, Aetna explained that punitive damages had an impact on the claim settlement value in only 2 of the 105 cases. It estimated the total impact to be less than $15,000 -- less than 1/10 of 1% of its total imdemnity payments. 8/

A survey of jury verdicts from over 30 jurisdictions in 10 states by the American Bar Foundation confirms the Aetna and Texas findings. The Foundation found that the percentage of plaintiff's verdicts that included a punitive damage component ranged from 0% in four jurisdictions to a high of 21.6% in Cobb County, Georgia. The

---

8/ Letter from Thomas L. Rudd, Superintendent, Insurance Department Affairs - Commercial Lines, Aetna Casualty and Surety Co., to Charlie Gray, Chief, Bureau of Policy and Contract Review, Attachment entitled "Bodily Injury Claim Cost Impact of Florida Tort Law Change," Aug. 8, 1986

percentage for New York City, Cook County, and Los Angeles County -- the three largest metropolitan areas in the nation -- were 1.6%, 2.2%, and 8.6% respectively. American Bar Foundation, Preliminary Report of the Punitive Damages Project 10-11, Feb. 8, 1986.

Finally, even the Rand Corporation's Institute for Civil Justice, which receives approximately half its funding from the insurance industry and most of the other half from major institutions supporting "tort reform," 9/ acknowledges that only about half the amount awarded as punitive damages is ultimately paid out, that punitive damage judgments are most frequent where defendants were found to have

---

9/ Rand Institute for Civil Justice, Contributions History, Sept. 7, 1984.

intentionally harmed plaintiffs, and that most punitive damage judgments are modest. 10/

In sum, the benefit of punitive damages is enormous while the cost is minimal. Bankers Life and the insurance industry amici have every right to expand their public relations campaign 11/ against the legal system in general and punitive damages in particular into this Court. But the empirical evidence demonstrates that it is entitled to no weight in this Court.

10/ Rand Institute for Civil Justice, Punitive Damages: Empirical Findings (1987), reported in Liability Week, March 30, 1987, at 2.

11/ In December 1984, for example, the Insurance Information Institute (III), the industry's public relations arm, launched what it called an "effort to market the idea that there is something wrong with the civil justice system in the United States." National Underwriter, Dec. 21, 1984, at 2.

II. THE EIGHTH AMENDMENT DOES NOT APPLY TO PUNITIVE DAMAGES IN CIVIL CASES.

The Eighth Amendment does not apply to punitive damages in civil cases. Ingraham v. Wright., 430 U.S. 651 (1977), is dispositive.

In Ingraham, this Court was faced with

Pursuant to that effort it sent a kit on the "civil justice crisis" to insurance executives and agents urging them to tell their policyholders and the media that "Insurers have no recourse but to cut back on liability insurance until improvements in the civil justice system will create a fairer distribution of liability, reduce the number of lawsuits and create a climate in which insurance can operate more predictably." Insurance Information Institute, "Outline for Speech: Crisis in the Civil Justice System," at 7, attachment to Memorandum from Mechlin D. Moore, President, Insurance Information Institute, to State Presidents and Senior Staff Executives of the Professional Insurance Agents, Nov. 11, 1985. Soon thereafter, the III announced a new $6.5 million television and magazine advertising campaign designed, in the III's words, "to change the widely-held perception that there is an insurance crisis to a perception of a lawsuit crisis." Journal of Commerce, March 19, 1986, at 1, 20. The ads featured polio victims, mothers,

the question whether school officials violated the Eighth Amendment by paddling schoolchildren. Observing that the Eighth Amendment was adopted almost verbatim from the English Bill of Rights, and that "the exclusive concern of the English version

---

ministers and high school athletes stating that "doctors are afraid to deliver babies, clergy are becoming reluctant to counsel their congregations, and high schools are thinking about closing down their sports programs" because of the "lawsuit crisis." E.g., Insurance Information Institute, "No One is Immune From the Lawsuit Crisis," The Washington Post Magazine, June 22, 1986. This year, amicus Aetna has been running similar ads. See, e.g., "Justice For All?", The Wall Street Journal, Jan. 23, 1987, at 21. Amicus Johnson & Higgins has also run similar ads. E.g., Johnson & Higgins, "Insurance is Getting Killed in Self-Defense" (1986).

Ironically, now that "tort reforms" have been enacted in several states, the insurance industry has found that "the impact of the [tort] changes generally ranged from marginal to imperceptible." Insurance Services Office, Inc., Claim Evaluation Project, at 4 (1987). See also "No Florida Savings Seen from Tort Law Reform," Journal of Commerce, Oct. 21, 1986, at 1A.

was the conduct of judges in enforcing the criminal law," the Court held that the Eighth Amendment "was designed to protect those convicted of crimes," id. at 664, and thus that schoolchildren who misbehaved in school were not entitled to its protection. The Court reasoned that schoolchildren had little need for the protection of the Eighth Amendment, since the openness of schools to public scrutiny and the supervision of schools by the county provided sufficient protection. Id. at 670.

The Court explained in Ingraham that both the English and American versions of the Eighth Amendment were intended to apply only to "the criminal process," id. at 664, while noting that Blackstone treated each of the three clauses of the English version as "bearing only on criminal proceedings

and judgments." Id. at 665. Even if the English version had been intended to apply outside the criminal process, however, it could not possibly have been intended to apply to punitive damages, since the English Bill of Rights was adopted in 1689, while the first English punitive damage case was not reported until 1763. Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763).

This Court has thus consistently held that the Eighth Amendment protects those convicted of crimes. E.g., Solem v. Helm, 463 U.S. 277 (1982) (life imprisonment for habitual criminal uttering a bad $100 check); Weems v. United States, 217 U.S. 349 (1910) (15 years at hard labor for falsifying a public document); Robinson v. California, 370 U.S. 660 (1962) (90 days in jail for being an addict). It has never held that the Amendment protects anyone

outside the criminal process. 12/ To the contrary, where defendants have claimed that it reaches beyond the criminal process, the Court "has had no difficulty finding the Eighth Amendment inapplicable." Ingraham v. Wright, 430 U.S. at 667-68, citing Fong Yue Ting v. United States, 149 U.S. 698 (1893) (deportation); Uphaus v. Wyman, 360 U.S. 72 (1959) (incarceration for civil contempt). When asked by schoolchildren to apply the Eighth Amendment outside the criminal process 10 years ago, this Court refused to "wrench[ ] the Eighth Amendment from its historical context." 430 U.S. at 669. That historical context has not changed in the last ten years.

12/ In a footnote in Ingraham, the Court left open the possibility that individuals incarcerated not in jails or in prisons but in mental or juvenile institutions might be protected by the Eighth Amendment. 430

III. THE EIGHTH AMENDMENT DOES NOT APPLY TO CORPORATIONS.

In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977), this Court stated that certain "purely personal" Constitutional guarantees do not apply to corporations because "the 'historic function' of the particular guarantee has been limited to the protection of individuals." Id. at 778-79 n.14, citing U.S. v. White, 322 U.S. 694, 698-701 (1944). Whether a constitutional protection is "purely personal" and thus not applicable to corporations, the Court

---

U.S. at 651 n.37. It cited In re Gault, 387 U.S. 1 (1967), in which the Court held that the Due Process Clause comes into play in proceedings that may lead to the incarceration of a juvenile. 387 U.S. at 13. The Ingraham Court thus did not leave open the possibility that the Eighth Amendment might apply to punitive damages in civil cases, as Bankers Life disingenuously implies. Bankers Life Br. at 19.

said, "depends on the nature, history, and purpose of the particular constitutional provision." 435 U.S. at 778-79 n.14. Because the nature, history and purpose of the Eighth Amendment indicate that it was intended to protect individual rights rather than corporate rights, this Court should not "wrench[ ] the Eighth Amendment from its historical context," Ingraham, 430 U.S. at 669, by applying it to corporations.

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Excessive Bail Clause can not possibly be applied to corporations, since a corporation by its artificial nature can neither be incarcerated by the government nor released on bail. Since "the Eighth Amendment imposes parallel

limitations on bail, fines, and other punishments," Solem v. Helm, 463 U.S. 277, 289 (1982), it is more logical to read the Amendment in its entirety as devoted to the protection of individual rights than to read part of it as also protecting corporations.

In addition, it is well-established that the Constitution does not protect corporations to the same extent that it protects individuals, since individual "rights are such as existed by the law of the land long antecedent to the organization of the state," whereas "the corporation is a creature of the state." Wilson v. United States, 221 U.S. 361, 383 (1911). Thus, "[c]orporate identity has been determinative in several decisions denying corporations certain constitutional rights," Bellotti, 435 U.S. at 778-79 n.

14, including the privilege against self-incrimination, Wilson, supra, and the right to privacy. California Bankers Association v. Shultz, 416 U.S. 21, 65-67 (1974).

Corporate identity should also be determinative with respect to the Eighth Amendment. For example, in Solem v. Helm, 463 U.S. 285 (1982), in which the Court summarizes the history of the Eighth Amendment, it notes that three chapters of the Magna Carta provided that amercements, or fines, could not be excessive. Chapter 20 protected freemen; Chapter 21 protected the nobility; and Chapter 22 protected the clergy. None protected corporations. 463 U.S. at 285. Bankers Life acknowledges that "the colonists, both before and after the Revolution, regarded Magna Carta and the English Bill of Rights of 1689 as

sources of their individual liberties." 13/ (emphasis supplied). Bankers Life does not claim, nor could it, that those documents granted the specific protections contained in the Eight Amendment to corporations.

Bankers Life also fails to cite a single case -- American or English, modern or ancient -- even suggesting that the Eighth Amendment or any of its antecedents protected corporations. To the contrary, all cases it cites in arguing that punitive damages should be subject to the Eighth Amendment involved individual defendants.

13/ Bankers Life Br. at 24. Appellant also notes that the Pennsylvania Frame of Government of 1682, which was based on the Magna Carta, provided that "all fines shall be moderate, and saving men's contenements, merchandise, or wainage," and that it has been characterized as "the most influential of the Colonial documents protecting individual rights." (emphasis supplied) Id. at 22.

E.g., Earl of Devon's Case, 11 State Tr. 1354 (1689) (30,000 pound fine imposed on Earl of Devon excessive); Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763) (300 pounds in exemplary damages against magistrate upheld); Kennedy v. Mendoza-Martinez 372 U.S. 144, 165-66 (1963) (individual stripped of citizenship entitled to 5th and 6th Amendment protection); Solem v. Helm, 463 U.S. 277 (1982) (life imprisonment for habitual criminal passing bad check held cruel and unusual punishment).

In short, just as the framers of the Constitutional guarantee against compulsory self-disclosure did not intend to protect "economic or other interests of ... organizations so as to nullify appropriate governmental regulations," White, 322 U.S. at 700, the framers of the Eighth Amendment

could not have intended to protect Bankers Life's economic interest so as to nullify the wholly appropriate action of the Mississippi Supreme Court in this case.

IV. EVEN IF THE EIGHTH AMENDMENT APPLIED TO PUNITIVE DAMAGE JUDGMENTS AGAINST CORPORATIONS, THE JUDGMENT IN THIS CASE WOULD NOT VIOLATE THE EIGHTH AMENDMENT.

Under the Eighth Amendment, the punishment must fit the crime. This principle -- "proportionality" -- "is deeply rooted in common law jurisprudence." Solem v. Helm, 463 U.S. 277, 284 (1982). It has been applied to invalidate the death penalty for rape, Coker v. Georgia, 433 U.S. 584 (1977), and for felony murder where the defendant neither took life nor intended life to be taken or lethal force to be used. Enmund v. Florida, 458 U.S. 782 (1982). It has also been applied to invalidate a sentence of 15 years at hard labor for falsifying a public document,

Weems v. United States, 217 U.S. 349 (1910), and one of 90 days for the crime of being an addict. Robinson v. California, 370 U.S. 660 (1962). Most recently, this Court applied the principle in invalidating a sentence of life imprisonment without parole for uttering a bad $100 check, where the defendant had previously been convicted of six non-violent felonies. Solem v. Helm, supra.

On the other hand, this Court declined to apply the proportionality principle in upholding a 40 year prison sentence for possession and distribution of nine ounces of marijuana. Hutto v. Davis, 454 U.S. 370 (1982). Nor did the Court apply the principle when it upheld a mandatory life sentence for obtaining $120.78 by false pretenses, $80 by fraudulent use of a credit card, and $28.36 by passing a forged

check. Rummel v. Estelle, 445 U.S. 263 (1980).

It is clear, therefore, that "successful challenges to the proportionality of particular sentences will be exceedingly rare." Solem, 463 U.S. at 290-91. All such challenges have been made under the Cruel and Unusual Punishments Clause of the Eighth Amendment; this Court has never held a fine disproportionate and thus violative of the Excessive Fines Clause, either in a criminal or civil case.

Applying proportionality analysis to the instant case presents serious practical problems. Bankers Life is a corporation whereas all other defendants alleging disproportionate punishment have been individuals; Bankers Life is a civil defendant whereas all other such defendants have been criminal defendants. Bankers

Life has been ordered to pay money whereas all other proportionality defendants faced death or imprisonment; Bankers Life owes money to a private party, whereas all other defendants "owed" their sentences to the government. Nevertheless, we now apply Eighth Amendment proportionality analysis to the instant case to the extent possible, and show that under that analysis the punitive damage judgment against Bankers Life would not be disproportionate.

In Solem v. Helm, the Court set out three factors, gleaned from prior cases, to be used in determining whether a punishment is proportionate to a crime. First, the Court considered the gravity of the offense and the harshness of the penalty. It found that Helm's offense -- uttering a bad $100 check after six non-violent felony convictions -- was relatively minor.

Helm's penalty of life imprisonment without parole, on the other hand, was the "penultimate penalty." 463 U.S. at 303. The only harsher penalty is death. Id. at 297. In contrast, Bankers Life has been deprived of neither life nor liberty. Its punishment is therefore less harsh than not only Helm's life sentence but also Rummel's life sentence and Davis's 40 year sentence, both of which this Court affirmed. Moreover, whereas Helm passed a bad $100 check, Rummel fraudulently obtained $230 and Davis sold nine ounces of marijuana, Bankers Life in effect stole $20,000 from Mr. Crenshaw, by refusing to pay him $20,000 which it knew it had a legal duty to pay. 14/ Thus, Bankers Life has been

---

14/ Aggravating circumstances were Bankers Life's offering Crenshaw an explanation it both knew was illegal and knew Crenshaw would not know it was illegal.

punished less severely than Helm, Rummel or Davis for committing a crime much more serious than that committed by Helm, Rummel or Davis.

Second, the Solem court considered the sentences imposed on other criminals in the same jurisdiction. It found that Helm, a resident of South Dakota, received the maximum sentence that could be imposed in South Dakota and had been treated as or more harshly than other criminals in South Dakota who had committed more serious crimes -- including murder, treason, arson and kidnapping. Id. at 298-99. In contrast, Bankers Life has been treated much more leniently than those who have committed less serious offenses in Mississippi. A man convicted of stealing $100, for example, may be punished by five years in prison, as well as a fine of $1,000 -- 3% of average household net worth

of $32,667. 15/ Miss. Code Ann. Sec. 97-17-41 (1972). For in effect stealing 200 times $100, Bankers Life has been deprived of no liberty, and of 1/2 of 1% of its net worth.

Third, the Solem court considered the sentences imposed for commission of the same crime in other jurisdictions. It found that in only one other state could Helm have even arguably received as severe a sentence as he did in South Dakota. Id. at 299-300. In contrast, while approximately 15 states bar or substantially limit punitive damages, 16/ in a majority of states Bankers Life

---

15/ U. S. Department of Commerce, Bureau of the Census, Household Wealth and Asset Ownership: 1984, at 1 (latest year for which figures are available).

16/ See Ghiardi and Kircher, Punitive Damages, Sec. 4, Table 4-1, at 26-30 (Supp. 1986); Liability Week, June 29, 1987, at 12.

could have been punished more severely than it was in Mississippi.

Application of each of the three factors the Court considered in Solem to the instant case thus indicates that the punitive damage judgment against Bankers Life is not disproportionate. 17/ In addition, this Court found that the deprivation of 40 years liberty for possessing and distributing nine ounces of marijuana is not disproportionate, and that deprivation of a lifetime of liberty for dishonestly obtaining $230 is not disproportionate. Therefore, a fortiori,

---

17/ Bankers Life attempts to make much of the difference between the $1.6 million in punitive damages and the $20,000 compensatory damages assessed against it. The principle of proportionality elucidated by this Court, however, refers to proportionality between the punishment and the crime, not between punitive damages and compensatory damages.

deprivation of no liberty for dishonestly obtaining $20,000 is not disproportionate.

CONCLUSION

By using the Eighth Amendment to attack a punitive damage judgment against a major corporation in a civil case, Bankers Life seeks to transform a Constitutional protection of individual rights in criminal cases into a Constitutional limitation on individual rights in civil cases. Nothing in the decisions of this Court, nor in the history of the Eighth Amendment or its antecedents, can support such a perverse result.

If the insurance consumer is to be protected, the punitive damages remedy must be maintained and strengthened. Otherwise, he is overmatched by an industry which is exempt from regulation by the federal government and ineffectively regulated by

state governments, and which possesses resources sufficient to mount a nationwide public relations campaign attacking the common law. The courts, and ultimately this Court, are the last best hope of the insurance consumer. The judgment of the Mississippi Supreme Court should be affirmed.

Respectfully submitted,

Jay Angoff,
National Insurance
Consumer Organization
121 N. Payne Street
Alexandria, VA 22314
(703) 549-8050

Counsel for Amicus Curiae